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IN THE
COURT OF APPEALS OF INDIANA

GLENN SWIFT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 10A01-0610-CR-446
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Cecile Blau, Judge
Cause No. 10D02-0409-FB-440

June 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Glenn Eugene Swift, Jr., appeals his sentence for dealing in cocaine as a Class B felony.[1] We affirm.

FACTS AND PROCEDURAL HISTORY

Swift was charged with dealing in cocaine after he and a companion delivered cocaine to a confidential informant on August 25, 2004. The trial court rejected two plea agreements between Swift and the State, and set the matter for jury trial on May 23, 2006. After a jury had been empanelled, Swift entered a "blind plea"[2] and the trial court found him guilty.

At his sentencing hearing, Swift and members of his family testified, as did a representative from New Beginnings, a residential facility "designed to give young men the opportunity to address and overcome prior drug and alcohol abuse." (Br. of Appellant at 5.) The trial court sentenced Swift to fifteen years in the Indiana Department of Correction and suspended five years on "strict terms of probation." (App. at 77.) In sentencing Swift, the trial court stated:

> The Court when it makes a sentence, Mr. Swift, takes a look at many factors. It does look at the Pre-Sentence Investigation Report, it takes a look at the nature of the arrests and the convictions that were involved. It takes a look at the, the nature of them, particularly at the drug offenses where there was repeated use. It takes a look at the variety of programs that were ordered to work with you before; home incarceration, probation, and there were a series of violations in those situations. The Escape charge advises the Court that basically whenever you were on home incarceration that usually means you should have been in jail but people are going to give you one more attempt or one more try. I can't speak for that specific case but that's generally the philosophy of the courts. So the bottom line is that

[1] Ind. Code § 35-48-4-1(a)(1).
[2] In a blind plea, the defendant pleads guilty without knowing what sentence might be imposed.

didn't work so in that particular case jail may have been what was needed. In making my decision I'm taking a look at a couple of things. I'm taking a look at the mitigating circumstances, the fact that you did recognize at least here that what you did was inappropriate and the wrong action, that you did apparently work during the time you were released and off jail, and the fact that there were not new charges filed against you is one of the, the Court won't consider it a mitigating factor but it's something that's important to the court. Probably the most, the strongest thing that I'm seeing on behalf of you is the strong family support that you have. But also that's something that really disturbs me because I don't imagine the strong family support just came in the last week or two. I have a feeling that it was there since 1997.

* * * * *

But the bottom line is you've had that family support. They're here. They're backing you up, both your father and your mother, and, and possibly a future stepfather. And that's all very important to the Court. The Court is very concerned about the drug offenses, is concerned about the probation, is concerned about the Terroristic Threatening. That just doesn't, you don't plead to that if it didn't occur. So those are all the things the Court's taking a look at in this situation.

* * * * *

So basically in taking a look at the sentence that's before the Court and the information that's before the Court, the Court does feel that the original recommendation given by the Probation Department is appropriate. And I am going to sentence you to the Indiana Department of Corrections [sic] for a fifteen year fixed term of imprisonment. Be, be aware that had your family not come here I would have had no qualms about the twenty year fixed term with time suspended. But it's because of their support that I feel that this sentence is more appropriate. With five years suspended upon strict terms of probation. As a term of probation you are to enroll in the New Beginnings Program immediately upon your release[.]

(Tr. at 77-81.)

DISCUSSION AND DECISION[3]

We review sentencing decisions for an abuse of discretion. *Moon v. State*, 823 N.E.2d 710, 717 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied* 841 N.E.2d 185 (Ind. 2005). In order for a trial court to impose an enhanced sentence, it must (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found to support those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. *Bostick v. State*, 804 N.E.2d 218, 224-25 (Ind. Ct. App. 2004).

Swift argues the trial court did not properly distinguish between the convictions and the arrests in his criminal history and thereby assigned too much weight to his criminal history as an aggravator. He also asserts the trial court should have considered the undue hardship an enhanced sentence would place on his dependents and should have given mitigating weight to his decision to plead guilty.

1. Aggravating Circumstances

Swift's criminal history includes six misdemeanor convictions in Kentucky: trafficking in marijuana in 1997, possession of marijuana in 1998, third degree criminal trespass in 1999, second degree attempted escape in 2000, possession of marijuana in 2001, and terroristic threatening in 2002. Swift was also charged as a juvenile for driving

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[3] As Swift notes, his conviction was based on events before the effective date of the current statutory sentencing scheme. Because the change from a presumptive to an advisory sentencing scheme is substantive rather than procedural, sentencing Swift under the revised sentencing scheme for acts committed before the statute's effective date would violate the prohibition against *ex post facto* laws. *See Weaver v. State*, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), *trans. denied* 855 N.E.2d 1011 (Ind. 2006). Swift does not challenge his sentence under *Blakely v. Washington*, 542 N.E.2d 296 (2004), *reh'g denied* 542 U.S. 961 (2004).

without a license and served one day in the juvenile detention center. Swift was arrested on four other occasions, but those arrests did not lead to convictions. The State had filed three probation violation petitions, but all of them were dismissed or withdrawn. One additional case was pending at the time of sentencing.

Swift argues: "Since some of the dismissed cases involved drugs or alcohol it is difficult to ascertain whether the trial court considered such when noting a criminal history involving drug offenses." (Br. of Appellant at 9.) He notes a "record of arrests, without more, . . . may not be properly considered as evidence that the defendant has a history of criminal activity." (*Id.* at 8) (citing *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005)). Because three of Swift's six *convictions* are drug-related, however, we cannot say the trial court improperly considered Swift's history of drug-related arrests.

Swift also challenges the trial court's statement probation had been unsuccessful in the past, arguing none of the probation violation allegations had "resulted in a formal finding that he had violated terms of his probation." (Id. at 9.) The pre-sentence investigation report indicates Swift stated he "had violated his probation in the past but all violations were dismissed or withdrawn." (App. at 94.) Swift testified the escape charge arose while he was in a home incarceration program. In light of Swift's admissions, the trial court did not abuse its discretion in finding these aggravating factors.

2. Mitigating Circumstances

The trial court must consider all evidence of mitigating circumstances presented by a defendant. *Gillem v. State*, 829 N.E.2d 598, 604 (Ind. Ct. App. 2005), *trans. denied* 841 N.E.2d 182 (Ind. 2005). The finding of mitigating circumstances rests within the

sound discretion of the trial court. *Id.* The trial court is not obliged to agree with the defendant as to the weight or value to be given any proffered mitigating circumstances. *Id.* at 605. An allegation the trial court failed to identify or find a mitigating factor requires the defendant to establish the mitigating evidence is both significant and clearly supported by the record. *Ware v. State*, 816 N.E.2d 1167, 1177 (Ind. Ct. App. 2004).

Swift notes his extended family's support was the "only mitigating evidence given serious consideration by the trial court." (Br. of Appellant at 10.) He argues the trial court "failed to consider the hardship an enhanced sentence might impose on his dependents." (*Id.*) At sentencing, counsel noted Swift was recently married with three children and two stepchildren. However, Swift did not argue an enhanced sentence would be an undue hardship on his dependents. "A defendant who fails to raise proposed mitigators at the trial court level is precluded from advancing them for the first time on appeal." *Pennington v. State*, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005).

Waiver notwithstanding, we note having dependents is not sufficient to prove undue hardship. *See Dowell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999) ("Many people convicted of serious crimes have one or more children, and absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship."). The trial court did not abuse its discretion by declining to find this mitigating circumstance.

Finally, Swift argues the trial court abused its discretion because it did not give mitigating weight to his guilty plea. Where the State reaps a substantial benefit from the defendant's plea, the defendant deserves to have a substantial benefit returned. *Sensback*

v. State, 720 N.E.2d 1160, 1164 (Ind. 1999). However, a guilty plea is not automatically a significant mitigating factor. *Id.* at 1165. Swift pled guilty on the day his trial was to begin, after the jury had been empanelled, and after at least seven witnesses for the State had been subpoenaed for trial. Although in some cases a guilty plea may save the State significant time and resources, this is not such a case. The trial court did not abuse its discretion by declining to give Swift's plea significant weight as a mitigator.

CONCLUSION

Because the trial court did not abuse its discretion in finding aggravating and mitigating circumstances, we find no error in the court's imposition of an enhanced sentence. Accordingly, we affirm.

Affirmed.

BAILEY, J., and SHARPNACK, J., concur.